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ORIGINAL

February 20, 1997

EX PARTE OR LATE FILED

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

Re: Customer Proprietary Network Information
CC Docket No. 96-115
<u>ORAL AND WRITTEN EX PARTE PRESENTATION</u>

Dear Mr. Caton:

On this date, Alexander V. Netchvolodoff of Cox Enterprises, Inc. ("Cox") and the undersigned, representing Cox, met with Regina Keeney, Chief of the Common Carrier Bureau, and with Larry Atlas, Bill Kehoe and Gayle Teicher of the Common Carrier Bureau staff regarding the above-referenced proceeding. During that meeting, we discussed the matters raised in the written ex parte communication from Mr. Netchvolodoff to Chairman Hundt filed on January 27, 1997 in this docket and the Commission's CMRS safeguards docket. The attached handouts were distributed at the meeting.

In accordance with the requirements Section 1.1206(a) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and copies are being provided to the Commission participants in the meeting.

Respectfully submitted,

J.G. Harrington

JGH/taf

cc: Regina Keeney
Larry Atlas
Bill Kehoe
Gayle Teicher

An Analysis of Statutory Provisions Affecting CPNI

The following is a brief analysis of provisions of the Communications Act that affect CPNI. It reviews Sections 222, 272 and 274. This review shows that the language of all three sections is consistent with the conclusion that affirmative consent is necessary before a LEC can use individually identifiable CPNI for purposes other than those covered by specific exceptions in Section 222. It responds to arguments made by certain Bell Companies in this proceeding.

Section 222

- **Consent is required for use of CPNI.**

  A carrier may use, disclose or permit access to individually identifiable CPNI only "as required by law or with the approval of the customer." The exceptions to this requirement are very limited: CPNI may be used for billing and collection for the underlying service and for publishing directories.

- **Nothing in Section 222 authorizes "negative option" consent.**

  There is no provision in Section 222 that permits "negative option" consent to use of CPNI. Every provision is consistent with a requirement for affirmative approval and there are specific provisions that suggest a negative option is not permitted. First, Section 222(a) refers to the "approval of the customer." This language is more consistent with affirmative consent than with a negative option, which would be denoted by language like "if the customer does not object." Second, Section 222(b) permits disclosure to "any person," including the underlying carrier and its affiliates, based on "affirmative, written" consent. Section 222(c)(3), which is an exception to the general consent requirement, permits oral consent on inbound telemarketing calls. It would make no sense to adopt oral, affirmative consent as an exception to the general rule if negative option consent generally were permissible. In addition, if a negative option were permitted there would be no need for the exception for directory information.

  It also should be noted that Congress has adopted specific negative option language for disclosure of potentially sensitive information in the past, such as in the Driver's Privacy Protection Act. The failure to do so in this case suggests that Congress did not intend for a negative option to be available for use of CPNI.

SECTION 272

- **Section 272 permits joint marketing between a BOC and its long distance affiliate under limited circumstances.**

Under Section 272(g), a BOC providing long distance services through a separate subsidiary may joint market its services if it meets certain conditions. The BOC long distance affiliate can joint market BOC local exchange services only if that opportunity is available to other long distance companies. In addition, the BOC may not joint market interLATA services provided by a separate affiliate in a state until it is authorized to provide interLATA services in that state. A BOC that joint markets in compliance with these requirements is deemed not be violating the non-discrimination provisions of Section 272(c), but Section 272(g) does not exempt the BOC from compliance with the other provisions of Communications Act.

- **The joint marketing provision does not address CPNI.**

As noted above, Section 272(g) does not exempt the BOC from compliance with the other provisions of the Communications Act. Consequently, unless there is a direct conflict between Section 272(g) and the requirements of Section 222, there is no need to reconcile the two sections. There is simply no conflict.

Section 272(g), while permitting joint marketing, provides only limited guidance on how that marketing may be conducted. The remainder of the Act provides such guidance. For instance, joint marketing of BOC local exchange and long distance service is subject to the Section 202 prohibition against unreasonable discrimination. Similarly, BOC joint marketing of local exchange and long distance service also is subject to the Section 222 requirements governing use of CPNI. Moreover, Section 222 imposes the same requirements on all telecommunications carriers, so there is no inconsistency between the obligations of the BOC and its long distance affiliate. The BOC cannot use its customers' CPNI to market long distance service without their approval, and neither can the long distance affiliate. Thus, Section 222 places no more of a burden on joint marketing of long distance service and local exchange service than it places on marketing either service individually.

SECTION 274

- **Section 274 greatly limits joint marketing of local exchange services and electronic publishing.**

  Unlike Section 272, which permits a wide range of joint marketing activities, Section 274 places very specific limits on joint marketing. Under Section 274(c), joint marketing between a BOC and its electronic publishing affiliate generally is prohibited. There are limited exceptions to this prohibition for inbound telemarketing and for electronic publishing joint ventures. As with Section 272, there is no language in Section 274 that exempts BOCs, their separate affiliates or electronic publishing joint ventures from complying with the rest of the Communications Act.

- **The joint marketing provisions of Section 274 do not affect a BOC's obligation to protect CPNI.**

  Section 274 does not in any way limit a BOC's obligation to protect CPNI and is not inconsistent with an affirmative obligation to obtain authorization before using a customer's CPNI. For instance, Section 274(c)(2)(A) permits joint inbound telemarketing, but does not contain language limiting the applicability of the inbound telemarketing provision in Section 222(c)(3). In fact, the additional requirements of Section 222(c)(3) apply only if CPNI is used in the course of inbound telemarketing. Similarly, the joint venture provision of Section 274(c)(2)(C) permits a BOC to provide marketing services to a joint venture, but does not contain any language concerning use of CPNI for that purpose. Thus, the general CPNI provisions in Section 222 govern. Most important, there is no conflict between Sections 222 and 274 because they address different topics.

POTENTIAL LEC USES OF CPNI

The following is a description of potential LEC uses of CPNI. This list is not intended to be exclusive, but to illustrate some of the range of potential use. As noted below, some of these uses are permitted by Section 222 of the Communications Act, but only if the same information is made available to other entities on reasonable, non-discriminatory terms and conditions.

- **Use long distance calling patterns to target potential long distance customers.**

  CPNI includes the "destination" of a user's calls. A LEC that also provides long distance service could use the long distance calling patterns of its customers to decide which customers will be the target of marketing campaigns. The LEC could use overall calling information to target marketing at high-volume households or could use information regarding calls to particular geographic regions or at particular times to offer specific plans to individual customers. This information is particularly competitively sensitive because it allows LECs to target another company's long distance customers based on their individual uses of long distance service and should not be disclosed without affirmative authorization by the customer.

- **Identify likely regions for mass marketing based on usage patterns.**

  Using aggregate CPNI, a telephone company could determine that a particular zip code or exchange has high usage of a particular type of service, such as call waiting, and use that information to determine where to send mass mailings for other services, such as voice messaging. This use of aggregate CPNI is permitted under Section 222 so long as the same information is made available to other entities.

- **Cross-sell customers purchasing services necessary to use competitors' offerings.**

  Sometimes a customer needs to purchase a specific LEC service to use a service offered by another company. For instance, call forwarding-busy/don't answer (also known as call forwarding-variable) is necessary for any voice mail service to work. If the customer calls the LEC to order the necessary LEC service, the LEC can cross-sell its own services, including competing services. This is not necessarily inappropriate if the LEC always cross-sells other services without using CPNI whenever a customer calls. LECs can also, however, use the information about the specific services being ordered by the customer to target those customers for marketing. For instance, as the Commission found in the *Computer III Remand Order,* BellSouth specifically targeted customers ordering call forwarding-busy/don't answer for cross-selling MemoryCall, BellSouth's own voice messaging service. Because the primary reason that customers ordered call forwarding-busy/don't answer was to permit them to use competing voice mail services, the effect of this policy was to force voice messaging companies to deliver potential customers who already had decided to purchase voice messaging directly to BellSouth. LECs should not be permitted to use this information without the affirmative consent of the customer.

- **Market customers who call particular telephone numbers.**

  As noted above, CPNI includes the destination of a customer's phone calls. Thus, CPNI could be used to target customers based on specific numbers that they call. For instance, a telephone company that also provided OVS or cable service could prepare a list of all customers who called the local cable company's customer service line or the number used to order pay-per-view movies, and even could rank order the list based on the number of calls each customer makes. (In some markets, where cable customers call a specific number for each pay-per-view channel, the telephone company could determine what movies each customer watched.) This information is highly competitively sensitive and should not be used without the specific authorization of the customer.

  Telephone companies also could use information about households that dial 900 numbers to target information services offerings, could use information about customers who make calls to numbers assigned to cellular or PCS providers to target wireless services marketing or could use information about customers who call America Online to target their on-line offerings. Again, this information is highly competitively sensitive to the companies providing these services. In many cases, information about who the customer calls also is highly sensitive for the customer, which further supports the need for affirmative authorization for its use.

- **Identify potential customers for new services based on volume of services already used.**

  The quantity of services used, such as the number of lines, is CPNI. A LEC could use this information in many ways to identify customers for its services. For instance, a LEC could decide to market its on-line service to all residential customers with a second line. It also could choose to offer special discounts on local service to high-volume long distance customers who might be vulnerable to competition from long distance companies providing local telephone services. This information should not be used without the affirmative consent of the customer.

- **Develop new services based on overall calling patterns of customer base.**

  A LEC could use aggregate CPNI to identify new services that would be attractive to its customer base. For instance, if a LEC determined that a high percentage of its customers were purchasing both three-way calling and second lines or both three-way calling and call waiting, it might develop services that permit conferencing between two lines or that permit a customer to add an incoming caller to a call already in progress. This use of aggregate CPNI is permitted under Section 222 so long as the same information is made available to other entities.